

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

United States of America,) CRIMINAL NO. 3:10-582-CMC
)
v.) **OPINION and ORDER**
)
Gary Bernard Ervin,)
)
Defendant.)

)

Defendant seeks relief in this court pursuant to 28 U.S.C. § 2255. Defendant raises a single claim relating to potential relief under the Fair Sentencing Act and *Dorsey v. United States*, 567 U.S. __, 132 S. Ct. 2321 (2012). The Government filed a motion for summary judgment, arguing that even though Defendant’s plea agreement contained language indicating that Defendant proposed to plead guilty to the offense of “500 grams or more of cocaine *or* 5 grams or more of cocaine base, Defendant’s plea was to the lesser included offense of distribution of 500 grams or more of powder cocaine and 5 grams or more of “crack” cocaine. The Government contends Defendant is not entitled to relief under the FSA as Defendant’s plea to 500 grams or more of powder cocaine was sufficient to trigger the applicable statutory threshold for the offense, even absent the amount of “crack” cocaine. Defendant has not responded to the Government’s motion and the time for doing so has expired.

The court has reviewed the complete record in this case, including Defendant's plea agreement and the transcript of the Rule 11 hearing in this matter. For the reasons stated in the Government's response, which this court finds to be correct and adopts as its findings, the court grants the Government's motion for summary judgment as to Defendant's claim for relief.

IT IS THEREFORE ORDERED that the Government's Motion for Summary Judgment

is **granted**. The motion under 28 U.S.C. § 2255 is *dismissed with prejudice*.

CERTIFICATE OF APPEALABILITY

The governing law provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find this court's assessment of his constitutional claims is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In this case, the legal standard for the issuance of a certificate of appealability has not been met. Therefore, a certificate of appealability is **denied**.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON McGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
February 6, 2013